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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 326

JAMES F. DOBBS,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LYKES BROS. STEAMSHIP COMPANY, INC.,

Respondent.

TO THE HONORABLES THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, James F. Dobbs, a merchant seaman, respectfully prays that a writ of certiorari issued herein to the United States Court of Appeals for the Fifth Circuit to review its judgment entered on March 28, 1957, regarding which said judgment a petition for rehearing was denied by the said Court on May 3, 1957.

OPINIONS IN LOWER COURTS

This cause was tried in Admiralty. The District Court for the Eastern District of Louisiana, New Orleans Division, made findings of fact and conclusions of law pursuant to Supreme Court Admiralty Rule 46½, which are reported at 140 Fed. Supp. 732 (1956).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit whose opinion is reported at 243 F. 2d 55 (1957).

The findings of fact and conclusions of law of the District Court are printed in Appendix "A" hereof. The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix "B" hereof.

JURISDICTION

This was an action for maintenance and cure, under the General Maritime Law.[1] The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on March 28, 1957;[2] the order of the Court of Appeals for the Fifth Circuit denying petitioner's timely application for a rehearing was rendered and entered on May 3, 1957.[3]

Jurisdiction of this Honorable Court is envoked under Title 28, U. S. C. A., Section 1254(1).

THE QUESTION PRESENTED

If a merchant seaman is afflicted with a serious physical ailment (glomerulonephritis), having mental and nervous complications, about which medical science knows relatively little, should the Trial Court, in passing upon the seaman's right to maintenance, decide the seaman's rights except for maintenance to the date of the trial?

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[1]The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903).
[2]R 424, 432.
[3]R 438.

STATEMENT OF THE CASE

Petitioner, a seaman, brought this action against respondent, his former employer, for maintenance and cure, allegedly due for an illness (glomerulonephritis) which petitioner contracted while serving aboard respondent's steamship, GENEVIEVE LYKES, as Chief Electrician during the period between December 15, 1952 and July 24, 1953.[3]

After a trial in Admiralty, the District Court rejected petitioner's claims and dismissed the case.[4]

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the dismissal of petitioner's suit.[5]

By this application, petitioner seeks a writ of certiorari to the Court of Appeals for the Fifth Circuit, to the end that the judgments of the Courts below may be modified insofar as they do not reserve unto petitioner his right to whatever future maintenance and cure he may be entitled subsequent to the date of the trial of this cause.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

There are no statutory provisions involved in this matter.

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[4]R 392.
[5]R 399.

The Constitutional provision applicable to the instant case is Article 3, Sec. 2, Clause 1:

> "The judicial Power shall extend to all Cases . . .. of admiralty and maritime jurisdiction; . . ."

THE FACTS

James Dobbs, an American seaman 27 years of age, was employed as Chief Electrician aboard the ocean freighter GENEVIEVE LYKES from December 15, 1952 until July 24, 1953.[6]

While in the service of the vessel he became acutely ill and was detached for medical treatment from the United States Public Health Service in New Orleans where he was admitted on July 24, 1953 and treated for a form of Bright's disease (glomerulonephritis) and a psychoneurotic disorder aggravated by the other treatment, until January 7, 1954.[7]

On January 7, 1954, petitioner was discharged to outpatient status, whereupon he attempted to obtain private medical attention which was not available to him while he was under treatment by the Public Health Service.[8]

On January 11, 1954, petitioner received a fit for duty discharge from that facility.[9]

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[6] R 30-33.
[7] R 35.
[8] R 35.
[9] R 35.

Upon being declared fit for duty by the Public Health Service, petitioner placed himself in the care of a private physician who hospitalized and treated petitioner from January 11, 1954 until the trial of the case on the days of April 12, 13, 14 and 19, 1955.[10]

On August 24, 1955, before this case was decided by the Trial Court, petitioner was admitted to the Southeast Louisiana Hospital, a mental institution, in Mandeville, Louisiana, because of his neurotic disturbance, precipitated by the Bright's disease, as evidenced by his psychiatric disorders during his hospitalization at the Public Health Service facility.[11]

(Petitioner is at present under the observation and care of the Louisiana State Mental Institution.)

REASON RELIED ON FOR GRANTING THE WRIT

The lower Courts in the instant case have undertaken to decide petitioner's right to future maintenance. In this case petitioner's physical and mental conditions are indeterminate.

The proper administration of the ancient and humane doctrine of maintenance and cure requires that this Honorable Court definitely proscribe the practice followed by the lower Courts in this case of passing upon the rights of

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[10]R 43, 49.
[11]R 396.

seamen to future maintenance in cases of incurable illnesses or illnesses for which medical science, at the time of trial, has discovered no cures.

ARGUMENT

Petitioner does not seek to have this Honorable Court review facts and re-examine the findings made by the Trial Court.

It is petitioner's contention that the judgment of the lower Courts have the effect of barring his future claims for maintenance which may arise from treatment bringing about his return to a normal or improved emotional status, and from new discoveries in medical science which will further alleviate or, perhaps, cure his physical illness.

In view of petitioner's emotional breakdown, subsequent to the trial herein, the decisions below are contrary to the decisions of this Honorable Court.

In the case of *Farrell v. United States*,[12] this Honorable Court enunciated the prevailing rule regarding the duration of maintenance in the case of an incurable, a totally blind epileptic.

Implicit in the *Farrell* decision is the expression that a seaman's right to future maintenance and cure should not be impaired if he is suffering from a so-called "incurable" disease.

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[12] 336 U. S. 511, 69 S. Ct. 707 (1949).

We submit that this inference is to be drawn from the Court's pause in the *Farrell* case to make the following observation:

> "The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."[13]

No such reservation is contained in the opinions of the Courts below in the instant case. We submit that, in this case, the fact of petitioner's complete emotional breakdown strongly implies that his illness had not reached the peak of its magnitude at the time of trial, much less its ultimate state of remission.

In order to protect petitioner's right to maintenance and cure from the time of the trial of this case, we respectfully submit that the judgment of which review is sought should be modified to the extent that petitioner's future rights to maintenance and cure may be definitely preserved.

WHEREFORE, petitioner prays that a writ of certiorari issue herein to the United States Court of Appeals for the Fifth Circuit in order that the opinion and judgment of that Court may be modified to the extent of protecting and pre-

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[13] Farrell v. United States, 336 U. S. 511, 69 S. Ct. 707, 711, (1949); see also, Hylton v. Standard Fruit & Steamship Company, 148 F. Supp 234 (D. Ct., E. D., La., 1957):

"Libellant's rights are reserved to claim whatever further maintenance and cure to which he may become entitled by reason of new discoveries in medical science."

serving petitioner's rights to whatever future maintenance and cure he may be entitled, toward which end all of the foregoing is

Respectfully submitted,

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APPENDIX "A"

(Number and Title Omitted)

FINDINGS OF FACT

I.

The respondent is a Louisiana corporation with its offices in New Orleans, and was and still is the owner and operator of the SS GENEVIEVE LYKES.

II.

The libelant, a merchant seaman, was chief electrician aboard the SS GENEVIEVE LYKES for one or more voyages prior to July 24, 1953.

III.

On July 24, 1953, the libelant was admitted to the United States Public Health Service Hospital at New Orleans (hereinafter referred to as the marine hospital), for a kidney ailment which was diagnosed as chronic glomerulonephritis. (nephrotic stage)

IV.

The libelant remained an inpatient at the Marine Hospital until January 7, 1954.

V.

While under treatment at the marine hospital, the libelant was seen in consultation by three specialists in internal medicine, each of whom was, either at the time of the consultation or at the time of the trial, the head of the department of internal medicine at the medical school of a major university. These consultations commenced within four days after his admission and continued to the time of his discharge.

VI.

The physician who was the medical resident in direct charge of the libelant's case at the marine hospital, Dr. Everett C. Sutter, testified on the trial in a completely objective and very impressive fashion.

VII.

The entire course of the libelant's treatment was followed in minute detail by Dr. Sutter. He prepared five large charts, several feet in length and width, upon which he plotted graphically the daily course of the libelant's illness as reflected in the many tests and examinations conducted on the libelant. The charts were prepared largely to reassure the libelant and his mother as to his recovery and also served as an aid to Dr. Sutter and the consultants. The charts are noted as concrete examples of the extraordinary care which the libelant received at the marine hospital.

VIII.

The libelant, through the two private consultants afforded to him by the U. S. Public Health Service as well as through Dr. Edgar Hull, who was called at the instance of his mother, had access to laboratory facilities and diagnostic techniques which would not have been available to a private patient. These extraordinary facilities, maintained by the university medical school, were available to and were used by his consultants who had access to them by reason of their positions on the medical school faculties. This again demonstrates the unusual character of the treatment afforded the libelant at the marine hospital, all of which was unqualifiedly approved by Dr. Hull.

IX.

The libelant and his mother both took the witness stand. Their demeanor while testifying, the conflicting stories related by them, and the wholly incomprehensible nature of some of their testimony, forced the court to conclude that the testimony given by them was not accurate and could not be relied upon.

X.

The libelant and his mother apparently have a "mother-son" relationship which results in a greatly over-solicitous attitude on the part of the mother and the complete dependence of the son upon the mother. This was manifest on the trial of this cause, even to a layman, and is borne out by the psychiatric reports in the marine hospital record. This relationship plainly appears to have been the cause of the

libelant's dissatisfaction with his treatment at the marine hospital.

XI.

Early in his hospitalization the libelant's mother came to New Orleans from Arizona, and her constant attendance upon her son had such an adverse effect on his recuperation that the medical staff and psychiatric consultants at the hospital found it necessary to take steps to reduce this contact. The libelant was removed from the seriously ill list so that he would be allowed to have visitors only during regular visiting hours, but this was not satisfactory and he was later transferred to, and allowed to remain in, the psychiatric ward where visitors were not allowed.

XII.

One of the effects of the "mother-son" relationship, as noted by the doctors at the marine hospital, was the exaggeration of his symptoms by the libelant. Thus, although he would actually get up and walk to the cafeteria for recreation, he could not, at the same time, support himself while being examined by his physicians.

XIII.

On January 7, 1954, the libelant was discharged from inpatient status at the marine hospital to outpatient status, with the following notation on his record:

> "It is felt at this time that the patient is physically fit to return to duty, but because of the marked

weakness which continues, he was discharged not fit for duty with determination of fitness for duty to be made as an outpatient. * * *. It is our opinion that the patient should be returned to duty as soon as feasible because of the mother-son relationship."

XIV.

The decision to discharge the libelant to outpatient status was made by the medical staff at a consultation held several weeks prior to his discharge. The libelant and his mother both testified to a wholly incredible conversation on January 7, 1954, with Dr. Sutter, wherein the latter advised them that he was to discharge the libelant as fit for duty on that day. This narration was positively refuted by the discharge given to the libelant.

XV.

On the Thursday when libelant was discharged as an inpatient (January 7, 1954), he was given a return appointment slip, whereunder he was to receive his first outpatient checkup on the following Monday, (January 11, 1954). As reflected in the note of January 7, it was contemplated that Dobbs should remain on outpatient status until he regained sufficient strength and self-assurance to be returned to duty. At the same time, it was felt that an early return to duty was advisable in the light of the "mother-son" relationship. The libelant, however, under the influence of his mother, was dissatisfied with the treatment he had received at the marine hospital, and had no intention of continuing his treatment there.

XVI.

On the day of his discharge from inpatient status at the marine hospital, Thursday, January 7, 1954, the libelant made an appointment to see and did see the urologist at a private clinic in the City of New Orleans. The urologist advised him that his complaint was within the field of a specialist in internal medicine, such as he had been treated by during the entire course of his hospitalization at marine hospital. He was then advised that there were no open appointments to see the clinic's internist for that day, and accordingly returned home.

XVII.

On the following day, Friday, January 8, 1954, the libelant, in company with his mother, went to the Veteran's Administration Regional Office in New Orleans, where his mother executed an application for hospitalization on his behalf. The application was referred to a Veteran's Administration physician, whose report states:

> "Brief History: Patient discharged at marine hospital yesterday with diagnosis of chronic glomerulonephritis (nephrotic stage).
>
> "Has numerous complaints about hospitalization there. Blames many of signs and symptoms in natural course of disease upon treatment, etc. received.

* * * *

"History and PE (physical examination) indicate no reason for hospitalization at present. Patient in no distress from renal disease."

The report concluded by prescribing "back to marine hospital clinic as scheduled."

XVIII.

The libelant's mother then telephoned Dr. Hull and requested that he refer her to a private physician who might undertake the treatments of the libelant. Dr. Hull furnished her with the name of Dr. Benjamin O. Morrison, whom the libelant went to see on the following day, Saturday, January 9, 1954. Dr. Morrison gave the libelant an examination in his office and checked the albumin in the libelant's urine. The latter test gave a 4 plus determination, which Dr. Morrison appeared to regard as very serious, and which apparently was the ultimate reason for his hospitalization of the libelant on Monday, January 11, 1954. The testimony of Dr. Hull revealed that a single test of this nature would not be significant; and would merely indicate a need for future observation. The court accepts the latter interpretation of this test as correct. The lack of significance in the albumin test is further borne out by the fact that on a subsequent hospitalization at Mercy Hospital in New Orleans, from October 18th to 20th, 1954, Dr. Morrison discharged the libelant although he had 4 plus albumin in his urine during the entire course of his hospitalization, including the day of discharge.

XIX.

The libelant on his initial visit to Dr. Morrison told the latter that he was dissatisfied with his treatment at the marine hospital and wished to obtain private treatment from Dr. Morrison. The doctor in turn told libelant that he could not undertake his treatment while he was receiving concurrent treatment at the marine hospital. This was the logical consequence of the fact that no patient can be treated simultaneously by two physicians or sets of physicians operating independently of each other.

XX.

At the time of his visit to Dr. Morrison on Saturday, January 9, 1954, the libelant had an outpatient appointment slip from the marine hospital which provided for a return visit to that institution on Monday, January 11, 1954. The libelant testified that Dr. Sutter had told him that he was to discharge him as fit for duty at the latter time. This is not correct; Dr. Sutter testified to the contrary, so, in effect, did Dr. Morrison, and the record clearly shows that the libelant at all times realized that he was to continue to receive care at the marine hospital.

XXI.

The parties agreed on the trial of this cause that the respondent was willing to pay the maintenance due the libelant during the period of outpatient care at the marine hospital, viz: January 7th to 11th, 1954, and the respondent has deposited the maintenance for this period in the registry of the court since the time of the trial, together with a sum

sufficient to include the libelant's costs. The only issue accordingly is the maintenance and medical expenses which libelant claims for the period subsequent to January 11, 1954.

XXII.

The libelant returned to the marine hospital for his first outpatient appointment as scheduled on Monday, January 11, 1954. He then undertook to procure his discharge from the marine hospital. He told Dr. Sutter who examined him that:

(a) He desired a fit for duty slip.

(b) He felt good except for residual weakness.

(c) He wished to go to San Francisco and would procure any further medical care which he might require at the United States Public Health Service Hospital there.

(d) He needed a fit for duty slip to "clear with his union".

XXIII.

As the name implies, the libelant's illness is a chronic one, but it may entirely disappear by a spontaneous remission. The reason for such a disappearance is unknown to medical science, and is unrelated to any treatments presently available. During the course of the disease its patients will suf-

fer "attacks" in the sense that the chronic disease will flare up into an acute or sub-acute stage.

XXIV.

The libelant at the time of his discharge from the marine hospital had received all the improvement in his condition that could reasonably be expected to result from nursing, care and medical treatment; he had received the maximum benefits available from such nursing, care and medical treatment. This is true despite the fact that the marine hospital would have continued to follow the libelant on outpatient status in the absence of his request for a discharge. He was cured as far as possible, and could return to a gainful occupation although the need for continued observation probably would prevent his returning to sea.

XXV.

The fit for duty slip given to the libelant by Dr. Sutter was issued for the reason stated in the outpatient note prepared by the doctor at that time. This states:

> "Now feels good except for residual weakness. Desires F.F.D. (fit for duty) slip. F.F.D. (fit for duty) slip given."

As noted, the fit for duty slip was given because it was requested by Dobbs. The hospital, obviously, could not force the libelant to accept its services where he was unwilling to do so.

XXVI.

Dr. Sutter believed that the libelant's transfer to San Francisco and attendant removal from his mother's influence was precisely what he needed before he would resume a gainful employment as he was then capable of doing, but contrary to what he told Dr. Sutter, the libelant desired his fit for duty slip to sever his connection with the marine hospital and to get private care from Dr. Morrison. He affirmatively rejected the treatment offered him at the marine hospital although such treatment had at all times been of the highest order.

XXVII.

The libelant, having procured his discharge from the marine hospital, entered a private hospital on that same day as the patient of Dr. Morrison. From that date, January 11, 1954, until the trial of this cause, the libelant remained a patient of Dr. Morrison's, and was hospitalized on more than a dozen occasions. Whether all or most of these hospitalizations were the result of one or more subsequent flare-ups in the libelant's illness does not appear from the record, nor does it appear that the treatment effected any real or significant change in the libelant's condition.

XXVIII.

When the respondent sent the libelant to the marine hospital, it thereby nominated that facility as an institution from which he was to receive his medical care. The treatment so proffered was, in all respects, proper and adequate. All of the care which libelant might have required sub-

sequent to January 11, 1954, was at all times available to him there, and he was at all times eligible to obtain it. The libelant knew this and his continued refusal to accept such treatment was unequivocal and final.

XXIX.

Assuming that all of the treatment received by libelant subsequent to January 11, 1954, was both proper and necessary, the libelant could not, and, of course, did not, prove what, if any, period he would have been on outpatient status, had he accepted this treatment from the marine hospital where all necessary and proper treatment required by him was at all times available.

XXX.

Libelant, while undergoing treatment under Dr. Morrison, lived in his mother's home when on outpatient status. He incurred, no expense or liability for his care and support there. This also applies to the sums expended for his medical care, hospitalization, etc., all of which were paid for by his mother.

CONCLUSIONS OF LAW

I.

This is a libel in admiralty by a seaman seeking to recover maintenance and cure from a shipowner and is within the admiralty and maritime jurisdiction of the United States and this court.

II.

A seaman becoming sick or disabled in the service of his vessel is entitled to be maintained and cured at the shipowner's expense. The right to such maintenance and cure extends to "a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected from nursing, care and medical treatment," *Calmar SS Corp. v. Taylor*, 303 U. S. 525, 82 L. Ed. 993, 58 S. Ct. 651, 1938 AMC 341, or to be cured as far as possible, *Farrell v. U. S.*, 336 U. S. 511, 93 L. Ed. 850, 69 S. Ct. 707, 1949 AMC 613. As found by the court, the libelant reached that stage of improvement on January 11, 1954. He was not entitled to maintenance and cure thereafter although he will require continued medical observation, see *Peterson v. U. S.*, 224 F. (2d) 748, 1955 AMC 1555 (CCA 9), also involving a case of chronic glomerulonephritis.

III.

The duty of a shipowner to provide maintenance and cure is a duty to tender adequate hospitalization, *The Saguache*, 112 F. (2d) 482, 1940 AMC 1203 (CCA 2), and our courts, taking cognizance of the marine hospital facilities, limit recovery by seamen "to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service" where marine hospital care is tendered, *Calmar SS Corp. v. Taylor*, supra.

IV.

A seaman who fails to report to the marine hospital and take treatment there loses his right to maintenance and

cure. *U. S. v. Loyola*, 161 F. (2d) 126, 1947 AMC 994 (CCA 9); *June v. Pan American Petroleum and Transport Company*, 25 F. (2d) 457, 1928 AMC 829 (CCA 5). The election of the facility, so long as that chosen is proper and adequate, is in the shipowner, and the seaman may not usurp that election with impunity. Where the shipowner has proffered the marine hospital to a seaman and the latter leaves that hospital or otherwise rejects the treatment afforded there, he loses his right to maintenance and cure. *The Gateway City*, 103 F. (2d) 987 (CCA 5, 1939); *The Santa Barbara*, 263 Fed. 369 (CCA 2, 1920); *Bailey v. City of New York*, 153 F. (2d) 427, 1946 AMC 369 (CCA 2); *Miller v. Lykes Bros. Ripley Steamship Company, Inc.*, 1937 AMC 1545 (D. C. La.); *Stewart v. U. S.*, 25 F. (2d) 869 (D. C. La., 1928). The libelant herein rejected the marine hospital treatment available to him, and, even if he had not reached maximum improvement on January 11, 1954, cannot recover for maintenance or cure, which remedies are co-extensive.

V.

A claim for maintenance is an ordinary contract claim arising out of an implied obligation of the seaman's contract of employment. The ordinary rules of contract law with respect to mitigation of damages apply, and a seaman seeking maintenance and cure can only recover for such periods as in the exercise of due diligence he could not avoid, see *Warren v. U. S.*, 75 F. Supp. 836 (D. C., Mass., 1948). The libelant, even if he were entitled to recover herein, has failed to carry his burden of proving what, if any, periods of outpatient care were necessary, i.e., would have been incurred if the marine hospital facilities had been utilized. Thus, even if his right to maintenance, apart from cure, had not

been forfeited by his rejection of the marine hospital treatment, he could not recover because he has failed to meet the burden of proof.

VI.

The libelant was maintained at the expense of his mother subsequent to January 11, 1954, and the latter also paid for his medical care at the same time. He therefore "incurred no expense or liability" for these items, and, in the absence of anything else, could not recover for them herein, *Johnson v. U. S.*, 333 U. S. 46, 92 L. Ed. 468; 68 S. Ct. 391, 1948, AMC 218; *Field v. Waterman SS Corporation*, 104 F. (2d) 849, 1939 AMC 1555 (CCA 5).

The respondent has fully discharged its obligation to provide maintenance and cure to the libelant, and a decree has been entered in favor of respondent, dismissing the libel.

New Orleans, Louisiana, March 20th, 1956.

(Signed) HERBERT W. CHRISTENBERRY
UNITED STATES
DISTRICT JUDGE.

APPENDIX "B"

(Number and Title Omitted)

Appeals from the United States District Court for the Eastern District of Louisiana.

(March 28, 1957.)

Before BORAH, RIVES, and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: This appeal is from the dismissal of a libel by a seaman seeking to recover for maintenance and cure.[1] The appellant had been Chief Electrician aboard the SS Genevieve Lykes for several voyages prior to July 24, 1953. On that date he was admitted to the United States Public Health Service Hospital at New Orleans[2] (hereinafter referred to as the marine hospital), for a kidney ailment which was diagnosed as chronic glomerulonephritis (nephrotic stage). He remained an inpatient at the marine hospital until January 7, 1954, or for nearly six months. It is without dispute that during that period he received unusually skillful, competent and diligent treatment and attention.

On January 7, 1954, the appellant was discharged from

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[1] A branch of the law recently discussed by this Court in Couts v. Erickson, No. 16,193, decided February 21, 1957, m/s; and in Rofer v. Head & Head, Inc., 226 F. 2d 927.

[2] See 42 U.S.C.A. §249.

inpatient status at the marine hospital to outpatient status with the following notation on his record:

> "It is felt at this time that the patient is physically fit to return to duty, but because of the marked weakness which continues, he was discharged not fit for duty with determination of fitness for duty to be made as an outpatient. * * *. It is our opinion that the patient should be returned to duty as soon as feasible because of the mother-son relationship."

He was given a return appointment slip under which he was to receive his first outpatient check-up on the following Monday, January 11, 1954. From the time of his discharge from inpatient status at the marine hospital on Thursday, January 7, 1954, to his return for the checkup on Monday, January 11, 1954, appellant and his mother saw numerous doctors: a urologist at a private clinic in New Orleans, a physician at the Veterans Administration Regional Office, Dr. Edgar Hull, an eminent specialist who had been called as a consulting physician at the instance of the mother while Dobbs was a patient in the marine hospital, and Dr. Benjamin O. Morrison, to whom Dobbs was referred by Dr. Hull, again at the instance of his mother.

On Dobbs' initial visit to Dr. Morrison, the doctor told him that he could not undertake his treatment while he was receiving concurrent treatment at the marine hospital. When Dobbs returned to the marine hospital for his first outpatient appointment as scheduled on Monday, January 11, he undertook to procure his discharge. The district court found that he told Dr. Sutter, the physician at the marine hospital primarily in charge of his case:

> "(a) He desired a fit for duty slip; (b) he felt good except for residual weakness; (c) he wished to go to San Francisco and would procure any further medical care which he might require at the United States Public Service Hospital there; (d) he needed a fit for duty slip to 'clear with his union.'"

In accordance with that request, Dr. Sutter gave Dobbs a fit for duty slip, and noted at the time in the outpatient record: "Now feels good except for residual weakness. Desires F.F.D. (fit for duty) slip F.F.D. (fit for duty) slip given."

On the same day he entered a private hospital as the patient of Dr. Morrison, and from that date until the trial in the district court, beginning April 12, 1955, he had remained a patient of Dr. Morrison and had spent most of his time in the private hospital. With reference to the later hospitalization of the appellant on the same date on which he was discharged as fit for duty, the district court found:

> "Dr. Morrison gave the libelant an examination in his office and checked the albumin in the libelant's urine. The latter test gave a 4 plus determination which Dr. Morrison appeared to regard as very serious, and which apparently was the ultimate reason for his hospitalization of the libelant on Monday, January 11, 1954. The testimony of Dr. Hull revealed that a single test of this nature would not be significant, and would merely indicate a need for future observation. The court accepts the latter interpretation of this test as correct. The lack of significance in the albumin test is further

borne out by the fact that on a subsequent hospitalization at Mercy Hospital in New Orleans, from October 18th to 20th, 1954, Dr. Morrison discharged the libelant although he had 4 plus albumin in his urine during the entire course of his hospitalization, including the day of discharge."

The case is further complicated by some mental, nervous, or emotional trouble from which the appellant suffers, and as the result of which, several months after the trial in the district court, he became a patient at the Southeast Louisiana Hospital, and by the possibility that his kidney trouble and the medication administered therefor may have aggravated his mental illness. Those complications have spurred his already able and careful counsel to the exercise of unusual skill and diligence in the prosecution of his claim. There was, however, no suggestion from any of the physicians who testified at the trial that the appellant was not then, and at the time of his discharge from the marine hospital, fully in possession of his mental faculties. In addition, the appellant testified in his own behalf, and his actions and demeanor were observed by the district court. In the course of his testimony, the following colloquy occurred:

"THE COURT:

* * * You seem to be all right as far as your appearance. You've been able to sit here for an hour and three quarters about, without any particular discomfort apparently. Why couldn't you have been working during that time? Is it your idea —

"THE WITNESS:

Your Honor, did you notice me taking something

awhile ago when we first came into court? It was a sedative."

The issue was narrowed to the right to recover for maintenance and medical expenses after January 11, 1954. As expressed by the district court:

> "The parties agreed on the trial of this cause that the respondent was willing to pay the maintenance due the libelant during the period of outpatient care at the marine hospital, viz: January 7th to 11th, 1954, and the respondent has deposited the maintenance for this period in the registry of the court since the time of the trial, together with a sum sufficient to include the libelant's costs. The only issue accordingly is the maintenance and medical expenses which libelant claims for the period subsequent to January 11, 1954."

Upon that issue the district court found facts[3] upon which it made the following conclusion of law:

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[3] "As the name implies, the libelant's illness is a chronic one, but it may entirely disappear by a spontaneous remission. The reason for such a disappearance is unknown to medical science, and is unrelated to any treatments presently available. During the course of the disease its patients will suffer 'attacks' in the sense that the chronic disease will flare up into an acute or sub-acute stage.

"The libelant at the time of his discharge from the marine hospital had received all the improvement in his condition that could reasonably be expected to result from nursing, care and medical treatment; he had received the maximum benefits available from such nursing, care and medical treatment. This is true despite the fact that the marine hospital would have continued to follow the libelant on outpatient status in the absence of his request for a discharge. He was cured as far as possible, and could return to a gainful occupation although the need for continued observation probably would prevent his return to sea."

"A seaman becoming sick or disabled in the service of his vessel is entitled to be maintained and cured at the shipowner's expense. The right to such maintenance and cure extends to a 'fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected from nursing, care and medical treatment,' *Calmar SS Corp. v. Taylor*, 303 U. S. 525, 82 L. Ed. 993, 58 S. Ct. 651, 1938 AMC 341, or to be cured as far as possible, *Farrell v. U. S.*, 336 U. S. 551, 93 L. Ed. 850, 69 S. Ct. 707, 1949 AMC 613. As found by the court, the libelant reached that stage of improvement on January 11, 1954. He was not entitled to maintenance and cure thereafter although he will require continued medical observation, see *Peterson v. U. S.*, 224 F. (2d) 748, 1955 AMC (CCA 9), also involving a case of chronic glomerulonephritis."

That conclusion cannot, in our opinion, be seriously questioned. Nor can we say, after the most careful examination of this record, that the findings of fact by the district court, with its advantage of seeing and hearing the witnesses,

were clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20.

We find it unnecessary to examine the several additional or alternative reasons assigned by the district court for its judgment of dismissal. The judgment is affirmed.

AFFIRMED.

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*Dr. Sutter's testimony comprised one hundred typed pages. His opinion and that of Dr. Morrison differed. The district judge, however, thought that Dr. Sutter made "a very, very impressive witness," that "he was just as frank and objective as he could possibly be."

Dr. Sutter testified that he would have continued Dobbs as an outpatient and would not have discharged him as fit for duty if Dobbs had not asked for the discharge, and on cross-examination explained in some detail the reasons for his discharge as fit for duty.

"Q. At the time of Mr. Dobbs' discharge from outpatient status, was it the consensus of the doctors at the Marine Hospital that he would have no recurrence of his symptoms or that there was reasonable medical probability that he would have a recovery?

* * * * * *

"THE WITNESS:

As I stated already, previously, this condition often flares up again and again and again and he was not well from the condition at the time of discharge. We realized that fact and we realized the fact that he may never get over the condition. Does that answer your question, sir.

"THE COURT:

You mean at the time he was discharged to outpatient status?

"THE WITNESS:

That's right. He was not well. We did not consider him over his kidney condition by any means.

"BY MR. KIERR:

"Q. Does that observation, doctor, apply to his discharge from the hospital to outpatient status as well as from outpatient status to his fit for duty status?

"A. Those remarks apply to both.

"Q. Yes, sir. Would you explain the reason that — would you explain in detail the reason that the fit for duty discharge was given to him, sir?

"A. Yes sir. Primarily for three reasons, I'd say. Firstly, because I felt that he was fit for duty and that his trip

CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served a copy of the attached petition upon the attorney for the respondent by depositing the same in the United States mails, postage pre-paid, at New Orleans, Louisiana, addressed to Edward S. Bagley, Esq., c/o Terriberry, Young, Rault and Carroll, Attorneys At Law, 825 Whitney Building, New Orleans 12, Louisiana.

July _____, 1957.

Samuel C. Gainsburgh

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would do him no harm. Secondly, from a psychiatric standpoint it had been strongly advised and thirdly because —

"THE COURT: Strongly advised that what?

"THE WITNESS: To put him back to active duty as soon as possible for rehabilitation from the psychiatric standpoint. Thirdly, he asked for the fit for duty slip so that he could straighten up with his union or shipping company prior to going to San Francisco."

On further cross-examination, Dr. Sutter testified:

"Q. At the time Mr. Dobbs left the Marine Hospital, doctor, was his condition active or inactive?

"A. You're talking about the time he was discharged from the hospital?

"Q. Yes, to outpatient status.

"A. Was his condition active or inactive?

"Q. Yes.

"A. It was considered inactive at that time.

"Q. And how about the date of his discharge from the outpatient department on January the 11th?

"A. It was considered inactive at that time or at least that it had met a plateau. In a case of nephrosis and glomerulonephritis — and I don't like to give expert testimony but to explain this, you have to follow a patient for months and years and usually until they die which might not be too long in any case of nephrosis with sedimentation rates and addis counts and those would have been performed had he continued as an outpatient."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 326

JAMES F. DOBBS,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

PETITIONER'S REPLY BRIEF

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Proctors for Petitioner,
James F. Dobbs

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 326

JAMES F. DOBBS,
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versus

LYKES BROS. STEAMSHIP
COMPANY, INC.,
Respondent.

PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Respondent contends in its brief[1] that there is no justification for granting the application for a *writ*, because it claims that petitioner's right to future maintenance and cure is "automatically" reserved.

Petitioner finds no comfort in respondent's apparent indifference to the plain, unambiguous language of the District Court (affirmed *verbatim* on appeal) that petitioner "reached that stage of improvement" from which no further improvement was to be expected, "on January 11, 1954"

[1]Respondent's Brief, pp. 4, 5.

and that, consequently, petitioner "was not entitled to maintenance and cure *thereafter* although he will require continued medical observation."[2]

The doubt and apprehension with which petitioner views these Courts' holdings stem from two significant words: "thereafter" and "future".

The finality of the unqualified, unmodified word "thereafter" is not obscure.[2A]

Just when does the "future" begin for this ward of the Court? Does it commence the day after the trial in the District Court, or should we reckon from the day after the appellate court's decision, or, perhaps, does petitioner's maintenance and cure right begin again after this Honorable Court has acted?

The answer to the question is obscured by the unusual situation which exists in the instant case; it is a situation which has not occurred heretofore during the experience of petitioner's counsel.

In this case there was before the appellate court material evidence which was not available at the trial in the District Court.[3]

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[2]Petitioner's Appendix "B", p. 27.

[2A]Black's Law Dictionary, Third Edition, p. 1726: "THEREAFTER. After the time last mentioned; after that; after that time; afterward, subsequently; thenceforth."

[3]Petitioner's Appendix "B", p. 27.

Since the decision of this Honorable Court in *McAllister v. United States*,[4] limiting the scope of appellate review in admiralty to that accorded in civil actions, no court has conducted a trial *de novo* on appeal. But, does *McAllister* completely abolish the institution of *de novo* appellate trials? We submit that it does not, and should not.

In the instant case, the Court of Appeals plainly acknowledged (a "complication" of the case) that, as a result of mental, nervous or emotional trouble, "*several months after the trial in the district court*" petitioner became a patient in a State mental institution.[5] Thus, the appellate court was aware of the new and material evidence, as it had a right to be on an admiralty appeal.

Furthermore, the Court of Appeals acknowledged that some causal connection might have existed between the "kidney trouble", the medication administered therefor and petitioner's mental illness.[6]

Notwithstanding these acknowledgments, the Court of Appeals apparently considered itself obliged to decide the case, not as of the time of the appeal *(de novo)*, but as of the time the case was tried in the District Court, only on the evidence available to the District Judge (and the expert witnesses who testified before him).

Considering itself thus restricted, the Court of Appeals stopped at the *McAllister* barrier, stating:

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[4]348 U. S. 19 (1954).
[5]Petitioner's Appendix "B", p. 27.
[6]Ibid.

"'Nor can we say, after the most careful examination of this record, that the findings of fact by the district court, . . . were clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20."[7]

Those findings of fact were made by the District Judge without the benefit of the evidence of petitioner's acute mental illness which had finally developed by the time of the appellate proceeding. Such evidence (and all of its permissive inferences) was not available at the time of the making of the findings which the then available evidence appeared to support.

Since the appeal in the instant case was a trial *de novo*, the entire body of the evidence and its inferences should have been completely and retrospectively considered by the Court of Appeals, as though it were the court of first instance.

We do not believe that in *McAllister v. United States* this Honorable Court intended to do away with *de novo* appellate trial in the instant circumstances. We submit that this case presents a classic illustration of circumstances for which the idea of *de novo* trial on appeal in admiralty was conceived.

If the Court of Appeals restricted itself as it appears to have done, this was error; a trial *de novo* should have been conducted on the appeal.

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[7] Petitioner's Appendix "B", pp. 29-30.

If the Court of Appeals actually conducted a trial *de novo*, as may be inferred from some of the language in the decision, we submit that the appellate court should have made appropriate findings of fact, *as of the time it considered the case*, so that petitioner might know exactly to what extent his medical history has been "merged in judgment."

This cause merits review by this Honorable Court, toward which end all of the foregoing is

Respectfully submitted.

RAYMOND H. KIERR,
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By: _____

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CERTIFICATE

I, the undersigned member of the bar of the United States Supreme Court, hereby certify that copies of the above and foregoing reply brief have been served upon respondent by depositing the same in the United States Mails, postage prepaid, at New Orleans, Louisiana, addressed to Messrs. Andrew R. Martinez and Edward S. Bagley, 825 Whitney Building, New Orleans 12, Louisiana, this ____ day of September, 1957.

Samuel C. Gainsburgh

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 326

JAMES F. DOBBS,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW R. MARTINEZ,
EDWARD S. BAGLEY,
Proctors for Respondent

TERRIBERRY, YOUNG, RAULT & CARROLL
Of Counsel

IN THE
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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition for a writ of certiorari herein seeks to have the decree of the lower courts "modified to the extent of protecting and preserving petitioner's rights to whatever future maintenance and cure he may be entitled." The utter lack of substance in the relief sought is demonstrated best by the fact that no such "modification" was sought at any time in the courts below. It is entirely unnecessary and would be improper, as a matter of law and fact.

THE FACTS

We will not endeavor to review fully the facts which are set forth in the findings of the District Court, Appendix A to the petition.

The courts below found that petitioner had received the maximum benefits available from medical treatment for his illness when he left the United States Public Health Service Hospital and, in fact, was fit to return to a gainful occupation.[1] This was a recovery both from his kidney disease and from the nervous or emotional disturbance which the psychiatrists at the United States Public Health Service Hospital found to be a manifestation of the forces exerted upon him by his mother as a result of their *Oedipus* or "mother-son" complex.[2]

The petitioner, however, now suggests that "he attempted to obtain private medical attention which was not available to him while he was under treatment by the Public Health Service." As noted in the opinion of the Court of Appeals, "*it is without dispute* that during that period (*i. e.* the period of his treatment by the Public Health Service) he received unusually skillful, competent and diligent treatment and attention." (Italics and parenthetical expression ours). Further, as found by the District Court (which findings petitioner specifically does not seek to have this Honorable Court review or re-examine), "all necessary and proper treatment required by him was at all times available" at the United States Public Health Service Hospital[3]

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[1]Finding of Fact XXIV.
[2]Findings of Fact XI, XII and XIII, Exhibits, Lykes 13, 14 and 15.
[3]Finding of Fact XXIX.

and "such treatment had at all times been of the highest order."[4]

The proof was clear that any nervous or emotional disturbance experienced by petitioner after the trial of this case resulted not from the kidney disease but from the influence exerted by his mother, as reflected in the findings of the psychiatrists at the United States Public Health Service Hospital and of the Trial Court.[5] The unsworn, *ex parte*, letters purportedly signed by a physician who first saw the petitioner some eighteen months after he left the United States Public Health Service Hospital and some four months after the trial of this cause, which were not admitted in evidence, cannot change these facts. As stated by the Court of Appeals, there was "no suggestion from any of the physicians who testified at the trial that the appellant was not then, and at the time of his discharge from the marine hospital, fully in possession of his mental faculties." The fact that the petitioner apparently experienced a mental or emotional disturbance some four months after the trial can only attest to the accuracy of the findings of the psychiatrists at the United States Public Health Service Hospital who felt that it was imperative that the petitioner remove himself from the influence of his mother.

ARGUMENT

The decision upon which the petitioner relies, *Farrell v. United States*,[6] affirmed the judgment of the lower court which had denied maintenance and cure beyond the date

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[4]Finding of Fact XXVI.
[5]Footnote 2, *supra*.
[6]336 U. S. 511, 93 L. Ed. 850, 69 S. Ct. 707, 1949 A.M.C. 613.

when the seaman had reached a condition of maximum cure. The Honorable Court, in its affirmance, added:

> " * * * The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

The decree of the lower court was affirmed without modification. There is no doubt but that any further right to claim maintenance and cure which the seaman in the *Farrell* case thereafter might have had was fully reserved to him despite the decree of the lower courts. No need for modification of the decree existed there and there is no need or justification for such modification here.

A decree dismissing a libel for maintenance on the ground that the seaman has reached maximum recovery does not preclude his right to further maintenance, in a proper case, where new medical treatments for the conditions involved are developed and the seaman is otherwise entitled to the relief sought. As this Honorable Court has said, the duty to provide maintenance and cure is a continuing one and judgments covering future maintenance are not permitted except for definitely ascertainable future periods.[7]

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[7] *Calmar Steamship Corporation v. Taylor*, 303 U. S. 525, 82 L. Ed. 993, 58 S. Ct. 651, 1938 A.M.C. 341.

CONCLUSION

The libel dismissed by the Trial Court's decree herein, affirmed by the Court of Appeals, correctly held that the petitioner had reached a stage of maximum possible cure at the time of his discharge from the United States Public Health Service Hospital. Any well-founded right which petitioner, in fact, might have to claim further maintenance and cure subsequent to the date of the trial was not precluded by the decree of dismissal, as a matter of law, and no need or justification for it's modification exists.

Respectfully submitted,

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BY: _____

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TERRIBERRY, YOUNG, RAULT & CARROLL
of Counsel

CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Bar of the Supreme Court of the United States do hereby certify that I have this day served a copy of the attached brief upon the proctors for petitioner by depositing the same in the United States mail, postage prepaid, at New Orleans, Louisiana, addressed to Raymond H. Kierr, Esquire and Samuel C. Gainsburgh, Esquire, 1746 National Bank of Commerce Building, 210 Baronne Street, New Orleans 12, Louisiana.

August _____, 1957.

Andrew R. Martinez